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Supreme Court of the United States

OCTOBER TERM, 1955

No. 255

MILLINERY CENTER BUILDING CORP.,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 255

MILLINERY CENTER BUILDING CORP.,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

THE TAX COURT OF THE UNITED STATES

21 T. C. No. 92

MILLINERY CENTER BUILDING CORP. (now Fashion Center Building Corp.), Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINIONS.—Promulgated February 26, 1954.

1. Petitioner purchased land which it had under lease for a period of 21 years for a consideration of $2,100,000. The fair market value of the land was $660,000, if it had been unimproved on the date of purchase. Petitioner claims that the remaining $1,440,000 was paid to secure the cancellation of a burdensome lease which had 21 years to run. Petitioner claims deduction of the $1,440,000 which, it maintains, should be allocated to the cost of canceling the lease as an ordinary and necessary business expense under section 23(a) of the Code. *Held*, the $1,440,000 is not deductible in the year paid as an ordinary and necessary business expense. *Cleveland Allerton Hotel, Inc.* v. *Commissioner*, 166 F. 2d 805, reversing T. C. Memorandum Opinion, not followed.

[fol. 2] (2) In the alternative, petitioner claims that it should be permitted to amortize over the remaining term of the lease all that it paid in excess of the value of the land, if it had been unimproved at the time of purchase, as the cost of canceling a burdensome lease. *Held*, that petitioner, in procuring the cancellation of its lease as a part of the transaction in acquiring the land, did not acquire a capital asset in the cancellation of its lease and has no legal ground for the amortization deduction which it claims under its first alternative.

(3) In its second alternative, petitioner claims that all that it paid in excess of the fair market value of the land

in an unimproved condition should be allocated as additional cost of its building and that it should be allowed depreciation based on this additional cost spread over the remaining useful life of the building. *Held*, that petitioner already owned the building and had been permitted to recover by way of depreciation, including the amount of depreciation allowed by the Commissioner in the taxable year, the full amount of the cost of its building and has no unrecovered cost which it is entitled to recover by way of depreciation. It has no additional cost of its building by reason of the transactions here.

4. In the taxable year petitioner incurred and paid $16,500 attorneys fees in acquiring title to the land and cancellation of the lease. The Commissioner disallowed petitioner the deduction of said amount on the ground that it was a capital expense. *Held*, the expenditure was made in the acquiring of capital assets and is not deductible.

Bernard Weiss, Esq., and Sidney Gelfand, Esq., for the petitioner.

John J. Madden, Esq., for the respondent.

[fol. 3] The Commissioner has determined a deficiency in petitioner's excess profits tax for the year 1945 of $39,465.62. The deficiency is due to five adjustments made by the Commissioner to the income as reported by petitioner on its return. These adjustments were:

(a) Capital Stock Tax	$ 5,000.00
(b) Legal Expense	16,500.00
(c) Prepaid Rent	8.33
(d) Depreciation	15,579.32
(e) Net short term capital gain	1,899.38
Total	$39,087.03

Adjustments (b) is explained in the deficiency notice as follows:

> (b) Deduction of legal expenses, in the amount of $16,500.00, incurred in connection with the acquisition of your property has been disallowed because it represents a capital expense.

Adjustment (d) is explained in the deficiency notice as follows:

> (d) A reasonable allowance for the depreciation of your building and improvements is determined to be $65,339.57, rather than the amount of $81,099.89 deducted in your return.
>
> No allowance has been made with respect to a payment by you to allegedly obtain the cancellation of a lease, in the absence of information showing that a deductible business expense was incurred.

In its original petition petitioner made two assignments of error:

> [fol. 4] a) The Commissioner of Internal Revenue has failed to allow as a deduction an ordinary and necessary business expense in the amount of $1,600,000.00 incurred to secure a release from a 21 year lease with a minimum rental of approximately $225,000.00 per annum.
>
> b) Alternatively to sub-paragraph (a) above, petitioner contends the Commissioner of Internal Revenue has failed to allow an additional deduction for depreciation in the amount of $35,961.60.

At the hearing petitioner filed an amended petition changing paragraph (b) above and adding (c) and (d), as follows:

> (b) Alternatively to sub-paragraph (a) above, petitioner contends the amount paid in excess of the value of the land, namely $1,500,000, should be amortized over a period of 21 years. Commissioner of Internal Revenue has failed to allow a deduction for such amortization.
>
> (c) In the further alternatives to sub-paragraphs (a) and (b) above, Commissioner of Internal Revenue has failed to allow an additional deduction for depreciation in the amount of $36,000.00.
>
> (d) Commissioner of Internal Revenue has failed to allow as a deduction that part of the legal expense in the amount of $16,500.00 and sundry expense in the amount of 4,552.50 incurred in connection with

obtaining a release by the petitioner from its lease agreement with the landlord.

The respondent's other adjustments are not contested.

[fol. 5] FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioner is a corporation with its principal office in New York City. The returns for the period involved here were filed with the collector for the third district of New York.

On April 30, 1924, petitioner leased land located at the northeast corner of Seventh Avenue and 38th Street, New York City. The size of the plot is 98 feet 9 inches on the east side of Seventh Avenue and 200 feet on 38th Street. The lease provided for an annual net basic rental of $100,000, plus the income taxes that would be incurred by the lessor upon the receipt of the $100,000 per annum. The lease between petitioner and the landlord was amended on November 30, 1935, to provide for an annual net rental of $118,840 without petitioner being liable for reimbursing the landlord for any income tax thereon. On April 16, 1945, petitioner exercised the option contained in the lease agreement to extend the lease for a period of 21 years to April 30, 1966.

In accordance with the terms of the lease, the petitioner-tenant erected a 22-story loft building at a cost of $3,000,000, including taxes, interest and insurance during construction on the leased land. Title to the building, improvements and fixtures belonged to the tenant-petitioner. Title to this property was to vest in the landlord at the expiration of the last term of the lease only at the option of the landlord. In the event of the destruction of the building by fire or other causes, the petitioner-tenant was still liable on the lease and could not abandon the lease. In the event of the destruction, in whole or in part, of the building petitioner-tenant at its own cost had to make the building whole. At the expiration of the lease or any renewal period, petitioner-tenant was to surrender the premises and the building to the landlord at his option, [fol. 6] free and clear of all encumbrances, without the landlord being obligated to pay for such property. Peti-

tioner-tenant had the option to renew the lease for two successive 21-year periods. The ground rent for the renewal period was to be six per cent of the value of the land at the termination of each period of the lease but not to be less than the basic rent of $100,000, plus the additional rent of $18,840. The value of the land was to be determined as if vacant and unimproved. The rent at six per cent of the value of the land, in May 1945, would have been less than the minimum basic rental of $100,000.

On May 11, 1945, petitioner entered into an agreement of sale with Wendel Foundation, the owner of the land. Title to the land was taken by petitioner on June 11, 1945. Petitioner purchased the fee and obtained release from the obligations of the renewed lease for $2,100,000. Petitioner purchased the fee to be released from the terms of the lease. Petitioner was most concerned about the annual rental of $118,840, which it deemed excessive, and the contingent liability to remove the building from the premises at the expiration of the lease upon the request of the landlord. The agreement of sale between Wendel Foundation, the lessor and owner of the fee, and petitioner contained, among other provisions, the following:

> Witnesseth that the Seller agrees to sell and convey and the Purchaser agrees to purhase:
>
> [Here follows a description of the premises.]
>
> The price is Two Million One Hundred Thousand Dollars ($2,100,000) payable as follows: Two Hundred Ten Thousand Dollars ($210,000) on the signing of this contract, receipt whereof by check subject to collection is hereby acknowledged, the non-payment of which check in due course shall give Seller the option of cancelling this agreement; and the balance, One Mil-
> [fol. 7] lion Eight Hundred Ninety Thousand Dollars ($1,890,000) on the delivery of the deed as hereinafter provided, by certified check satisfactory to the Seller, the check to be drawn to the order of the Seller and payable through the New York Clearing House.
>
> . . . . . .
>
> Seller shall execute upon request of Purchaser an agreement cancelling and terminating said lease as

of the time of the actual closing of title hereunder. It is agreed however that regardless of whether Purchaser accepts title to the premises subject to the aforementioned lease or elects to have an agreement cancelling and terminating same, the idemnity [sic] agreements of Purchaser contained in the said lease shall continue in full force and effect after closing of title in favor of the Seller with respect to any liabilities or obligations of Seller assumed by or imposed upon it by the terms of the lease or any such agreements of amendment, modification, extension or renewal or arising out of Seller's ownership of the said premises.

* * * * * * * *

The deed shall be in proper statutory short form for record in the usual form of a Bargain and Sale deed containing no covenant or warranty and shall be duly executed and acknowledged by Seller at Seller's expense. * * *

The agreement of cancellation of the lease was executed June 11, 1945, and contains, among other things, the following language:

Whereas, the Tenant requested the Landlord to accept a surrender of the demised term and the Landlord agreed to accept such surrender provided this agreement was executed simultaneously with the execution of the formal agreement of surrender, which [fol. 8] formal agreement of surrender is being executed and delivered simultaneously herewith:

Now, Therefore, in consideration of the premises and the sum of One Dollar ($1.00) and other good and valuable consideration by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto do hereby mutually release one another and their successors and assigns from any and all obligations under said lease and modification agreement and under said agreement of renewal and extension thereof. * * *

The land purchased by petitioner contained 19,750 square feet and was located in Block No. 814, bounded by 38th Street, Seventh Avenue, 39th Street, and Broadway. The Millinery Center Building and the land on which it stood were assessed for real estate tax purposes as follows:

	Land	*Building*	*Total*
1943-1944	$1,470,000	$2,305,00	$3,775,000
1944-1945	1,410,000	2,165,00	3,575,000

The remainder of Block No. 814, comprising 45,178 square feet and improvements thereon, was sold on December 2, 1943, for $1,250,000. This property had a frontage of 205 feet on the west side of Broadway, 301 feet on 39th Street, 165 feet on 38th Street, and 98 feet and 9 inches on Seventh Avenue, and was assessed for real estate tax purposes as follows:

	Land	*Building*	*Total*
1943-1944	$3,830,000	$115,000	$3,945,000
1944-1945	3,735,000	100,000	3,835,000

Lot 64 of Block No. 813 on the southeast corner of 38th Street and Seventh Avenue had the same frontage with [fol. 9] identical dimensions as the property in question and was located directly across the street. Lot 64 was offered for sale in 1945 for an amount less than $600,000 but remained unsold. That lot with improvements was previously sold on March 1, 1944, for $600,000. This property was assessed for real estate tax purposes as follows:

	Land	*Building*	*Total*
1943-1944, and 1945-1945	$1,225,000	$35,000	$1,260,000

Lot 55, Block No. 713 was leased in December 1924 by the landlord for a net basic rental of $115,000, plus the income taxes thereon, for a term of 21 years with two renewal options of 21 years each. The rental was changed to $138,000 in lieu of $115,000, plus the income tax thereon. Pursuant to the terms of the lease, the lessees had erected a 23-story building which was completed in 1926. The lease was renewed on April 26, 1945. On May 8, 1945, the

fee to the land, on which was the building erected by the tenant and subject to a long-term lease, was sold to the Woodmen of the World for $2,250,000.

In 1945, the United States Government restrictions on building construction, plus the restrictions contained in New York State rent laws adversely affected the value of land. Limitations Order L-41 restricting building construction became effective in 1942 and was still in effect through the year 1945.

The value of the land, vacant and unimproved, upon which the petitioner's property stood was $660,000 when purchased by petitioner in 1945.

Petitioner incurred legal fees aggregating $16,500 in connection with the purchase of the fee and the release from the obligations under its lease with the Wendel Foundation.

[fol. 10]

OPINION

BLACK, *Judge*: Petitioner states the issues raised by the pleadings, in its brief, as follows:

I

Is the petitioner entitled to deduct the amount of $1,500,000 or any part thereof incurred in connection with the cancellation of a burdensome lease as an ordinary and necessary expense under Section 23(a) or as a loss under Section 23(f) of the Internal Revenue Code? Or, in the alternative, is the petitioner entitled to amortize the said $1,500,000 or any part thereof incurred in obtaining a release from the burdensome 21 year lease over the remaining term of such lease?

II

In the further alternative, is the petitioner entitled to capitalize that part of the price paid of $2,100,000 over and above the actual land value as the purchase price of the building and depreciate said cost of building over the remaining building life of 30 years?

III

Is petitioner entitled to deduct that part of the $16,500.00 legal expenses incurred to acquire the fee and

See also, *Chas. A. Clark*, 19 T. C. 48; *Bagley & Sewell*, 20 T. C. 983.

[fol. 28] This Court itself has recognized that principle in *Helvering v. Community Bond & Mortgage Corporation*, 74 F. 2d 727, and in *Roscoe v. Commissioner*, 215 F. 2d 478. (Not previously cited to the Court). While the latter case is the contra to that of the Millinery Center Building Corporation, the principle is the same. In that case two stockholders sold all of their holdings in a real estate corporation with which the corporation had an exclusive contract to sell the realty subdivision. The amount received for the stock was in excess of the actual value. The sale contract was for a unitary amount for the stock but as part of the contract the taxpayers agreed to cancel their agreement of exclusive agency. This Court upheld the Tax Court in taxing as ordinary income that part of the selling price in excess of the value of the stock. This Court said whether the excess amount represented compensation for services or payment for cancellation of an undesirable contract, it would be ordinary income. The important point is that the Court looked through the form of a unit price to get to the substance and sustained an allocation between the amount received for the actual value of the asset being sold and for services or cancellation of a contract.

This principle of having the intent of the purchaser govern the taxability of the transaction as well as allocating a single purchase price to the purposes for the payment has also been recognized in tangible property and real estate transactions. Thus, in *Olympia Harbor Lumber Co. v. Commissioner*, 30 B. T. A. 114, the petitioner paid $7,900 to acquire certain equipment owned by the vendor with a value not in excess of $2,500, and with the purchase of said equipment a contract between the petitioner and the vendor was automatically terminated though not specifically stated. The difference of $5,400 was considered to be paid to rid [fol. 29] the purchaser of an unsatisfactory contract and the deduction was allowed.

Similarly there is a line of cases dealing with the acquisition of the stock of a company in order to acquire real estate and other assets wherein it has been held that although the stock was what was actually acquired, and all the rights

to cancel a burdensome lease that is applicable to the cancellation of the burdensome lease?

The principal issue in this proceeding is whether petitioner, a lessee in possession who purchases the fee and the cancellation of the lease for a price greater than the value of the land, may allocate a portion of the purchase [fol. 11] price to the purchase of the lease and deduct the allocated portion as a business expense under section 23(a). Respondent in his deficiency notice determined that "No allowance has been made with respect to a payment by you to allegedly obtain the cancellation of a lease, in the absence of information showing that a deductible business expense was incurred." Respondent still contends that no part of the purchase price of $2,100,000 paid by petitioner in 1945 to the Wendel Foundation can be deducted as a business expense nor is petitioner entitled to use any part of this purchase price as a basis for amortization or depreciation deductions. For reasons which we will presently give, we think respondent must be sustained in each of these contentions.

Business Expense

Petitioner paid $2,100,000 under the agreement of May 11, 1945, to the Wendel Foundation. Credible and uncontradicted testimony placed the value of the land at $660,000, if it had been in an unimproved condition at the time of purchase. But it must be remembered that petitioner did not purchase the land in an unimproved condition. The land, when petitioner purchased it in 1945, was improved by a building which had been erected by petitioner in a prior year at a cost of $3,000,000, and the land was leased to petitioner for a term of 21 years still to run at an annual rental of $118,840. What petitioner paid Wendel Foundation $2,100,000 for was the bundle of rights which it obtained in the purchase. Included in this bundle of rights was the cancellation of the lease which still had 21 years more to run. Petitioner contends that all above $660,000, which was the value of the land if it had been in an unimproved condition, or $1,440,000, represented the price which it paid for the cancellation of its lease and that this entire [fol. 12] amount of $1,440,000 should be allowed in the tax-

able year 1945 as a deductible business expense under section 23(a) of the Code printed in the margin.[1] Petitioner, in contending that the entire amount of $1,440,000 should be allowed as a deduction for business expense in the taxable year, relies heavily upon *Cleveland Allerton Hotel, Inc.* v. *Commissioner*, 166 F. 2d 805, reversing T. C. Memorandum Opinion. In that case the court of appeals said:

> As purely legalistic formalism, this argumentation bears an aura of validity. Realistically considered, however, it will not stand analysis. The status of the petitioner does not approximate that of a third person investor, buying real estate to which is appurtenant a long-term profitable lease. The petitioner already had the use of the land with full control and dominion over it, subject only to its obligation to surrender it at the end of the term. The lease was a liability which it sought to extinguish. This it was [fol. 13] impossible to do merely by buying acquittance and giving up possession of the premises. It had thereupon a valuable hotel building which it could not take away with it. The only interest in the land it secured

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[1] SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or business expenses.—

(A) In general.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

ly the purchase that it did not already have was the reversionary interest, which all parties appear to consider as of only nominal value. To consider that remainder a capital asset with a value of $441,250 requires, it seems to us, a naivete not attributable to experienced and sophisticated taxing authority. * * *

If numerous admonitions that taxation is a practical matter, that taxing authority may look through form to substance, is not mere rhetoric where the taxpayer's interest is involved, and a working formula only when it is of advantage to the Treasury, it would seem to be clear that the petitioner paid all over $200,000 to escape from a burdensome lease, and should be able to write that off as an expense of doing business.

We are unable to agree with the learned court that in a case like the *Cleveland Allerton Hotel* case or the one which we have here, the taxpayer should be allowed to deduct as a business expense in the year when paid that part of its payment which it claims should be allocated to the cancellation of a burdensome lease. The court in holding that the amount which the taxpayer claimed should be allocated to the cancellation of the burdensome lease and should be allowed as a deductible business expense in one year said:

This being so, we find ourselves in accord with the decision of the Third Circuit in Cassatt v. Commissioner, 3 Cir., 137 F. 2d 745 and with the decision of the Board of Tax Appeals in Appeal of Denholm & McKay Co., 2 B. T. A. 444, that payments of this char- [fol. 14] acter must be deducted on the taxpayer's tax return as an expense of doing business in the year when made. * * *

We think *Cassatt* v. *Commissioner*, 137 F. 2d 745, affirming 47 B. T. A. 400, and *Denholm & McKay Co.*, 2 B. T. A. 444, are distinguishable. In *Denholm & McKay Co.*, the taxpayer did not own the building which it was renting. Both building and land were owned by the Denholm & McKay Realty Co. and what the taxpayer purchased from

the Realty Co. was a complete cancellation of the lease and a surrender of possession under that particular lease and the securing of a new lease of the same building under much more favorable terms than the old lease. Denholm & McKay did not acquire title to the land from the Realty Co. In *Cassatt* v. *Commissioner*, *supra*, the court pointed out that:

> In the early part of January, 1935, Cassatt and Company were obligated on several leases of office space for terms not expiring until 1941. The aggregate prospective rentals for these leases was $1,076,000. A settlement was effected with the various landlords whereby, for $346,524.06 the leases were cancelled for the unexpired terms. * * *

Thus, in that case there was not only a cancellation of the leases but a complete surrender of possession thereunder to the landlords.

We have no such case here. As we have already pointed out, petitioner, in making purchase of the cancellation of the lease from Wendel Foundation, had no notion of surrendering possession to the landlord. If it had done so, we would, of course, have an entirely different case from the one we have here. It owned a 22-story steel and concrete building which, according to testimony, had a remaining [fol. 15] useful life of 30 years. What petitioner purchased for $2,100,000 is shown in its contract of purchase dated May 11, 1945, followed by the deed to the property which petitioner received on June 11, 1945. Petitioner purchased a capital asset and we sustain the Commissioner in his determination that no part of the purchase price can be deducted as a business expense in 1945. Cf. *Home Trust Co.* v. *Commissioner*, 65 F. 2d 532.

Claim for Amortization Deduction

Petitioner's first alternative is stated thus in its brief:

> However, in the event the Court should find that the amount paid in excess of the land value to effect a saving in rent expense is a capital asset, petitioner ther

> claims it is entitled to amortize said asset over 21 years, the remaining life of the cancelled lease.

Petitioner does not cite any authority in support of this first alternative contention and we do not know of any. It is, of course, true that if a taxpayer purchases a lease which has, say 21 years to run, and does not purchase the fee his purchase is a wasting asset and the cost of the lease is not deductible in the year of purchase but must be amortized over the life of the lease. See *Home Trust Co. v. Commissioner*, *supra*, and many cases there cited. But here petitioner has not purchased any lease. In the transaction which has been consummated petitioner has obtained title to the land and has secured the cancellation of the lease which, under the circumstances then existing, it regarded as burdensome. It is true, of course, that petitioner in the purchase of land acquired a capital asset but it is not an asset which is subject to depreciation or amortization. Its value may increase from year to year or, on the [fol. 16] other hand, may decrease but gain or loss can be taken only when the land is finally disposed of. But, while it is true that petitioner in the purchase of the land in 1945 acquired a capital asset, we do not think it can be said that petitioner in procuring the cancellation of its burdensome lease acquired a capital asset which it can amortize over the remaining term of the lease. The lease was at an end when petitioner procured its cancellation in 1945. We think petitioner's first alternative contention must be denied.

Additional Depreciation on the Building

Petitioner's second alternative is stated in its brief as follows:

> In the event the Court should find that no part of the payment of $2,100,000 represents an allowable deduction for obtaining a release from a lease agreement, petitioner then contends that $1,500,000 represents the cost of building which it is entitled to depreciate over a remaining life of 30 years.

The following facts with reference to depreciation seem to be undisputed by the parties: The respondent, for the

taxable year, has allowed petitioner depreciation on the building equivalent to petitioner's unrecovered cost because its first 21-year term of the lease ended in 1945. That depreciation deduction is not in dispute here. During this original 21-year term of the lease, including the part of it which expired in 1945, petitioner has recovered tax free through depreciation deductions the entire $3,000,000, cost of erecting its building. Petitioner has claimed, however, on its return for 1945, that it acquired the building in effect for the second time in 1945 and has claimed depreciation on this second cost. This latter amount of depreciation [fol. 17] the Commissioner has disallowed and has confined his allowance for depreciation deduction petitioner's unrecovered cost of its building. Petitioner having fully recovered the cost of its building by way of depreciation deductions in 1945 and prior years had no unrecovered cost of its building.

We think that the bundle of rights which petitioner acquired by its contract of purchase of May 11, 1945, followed by the deed of June 11, 1945, was so inextricably entwined in the acquiring of the land as not to be separable therefrom. We think that no part of the $2,100,000 which petitioner paid can be allocated to the cost of the building which petitioner already owned and which it had been allowed to fully depreciate over the first 21-year term of the lease. The building and the lease were not bargained for or purchased separately. They were included, in so far as the lessor had any interest therein, in the single transaction of the contract of purchase of the land and the deed to petitioner thereof. If petitioner were allowed additional depreciation deductions for the building which it claims in its second alternative, it would then have depreciated the building once since it has been erected and paid for by petitioner and a second time because it has purchased the land under the building. Petitioner cites no case which would support such a deduction and we know of none. Petitioner's second alternative is denied.

The only other issue which remains for our decision was stated in petitioner's brief as follows: "Is petitioner entitled to deduct that part of the $16,500.00 legal expenses incurred to acquire the fee and to cancel a burdensome

lease?" The Commissioner in his disallowance of this deduction stated in his deficiency notice: "Deduction of legal expenses, in the amount of $16,500.00, incurred in connection with the acquisition of your property has been disallowed because it represents a capital expense." We think the Commissioner must be sustained in the disallowance of this claimed deduction. It was made to obtain [fol. 18] capital assets and, as such, did not represent a deductible expense.

Reviewed by the Court.

Decision will be entered under Rule 50.

Withey, J., concurs in the result.

ARUNDELL, MURDOCK, OPPER, TIETJENS, RAUM and RICE, JJ., dissenting:

Some part of the purchase price should be allocated to the additional rights in the building acquired in the purchase, using the principle of *Cohan* v. *Commissioner*, 39 F. 2d 540, if necessary. This additional cost of the building would then be recovered through depreciation.

[fol. 19] THE TAX COURT OF THE UNITED STATES

Washington

Docket No. 36321

MILLINERY CENTER BUILDING CORP., (now Fashion Center Building Corp.), Petitioner;

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION—Entered March 22, 1954

Pursuant to the Findings of Fact and Opinion of the Court promulgated February 26, 1954, the parties on March

22, 1954, having filed an agreed computation of the tax, now therefore, it is

Ordered and Decided: That there is a deficiency in excess profits tax for the taxable year 1945 in the amount of $39,465.62.

(Signed) Eugene Black, Judge.

Enter:

Entered Mar. 22, 1954.

[fol. 20] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued March 15, 1955

MILLINERY CENTER BUILDING CORPORATION, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

OPINION—April 14, 1955

Before Clark, Chief Judge, Frank, Circuit Judge, and Galston, District Judge

Petition to review a decision of the Tax Court of the United States, Eugene Black, Judge.

Petitioner, Millinery Center Building Corporation, seeks review of a decision, 21 T.C. 817, finding a deficiency in its excess profits tax for 1945, based on disallowance of deduction, depreciation, or amortization of sums expended in cancellation of a lease through acquisition of, and merger with, the underlying fee. Reversed and remanded.

Charles Korn, New York City (Bernard Weiss, New York City, on the brief), for petitioner.

Carolyn R. Just, Sp. Asst. to Atty. Gen., Washington, D. C. (H. Brian Holland, Asst. Atty. Gen., and Ellis N. Slack, A. F. Prescott, and Louise Foster, Sp. Assts. to Atty. Gen., Washington, D. C., on the brief), for respondent.

CLARK, Chief Judge:

This petition for review contests the finding of a deficiency in petitioner's excess profits tax for 1945, based on the refusal to allow as a business expense the amount paid [fol. 21] to terminate an allegedly burdensome lease. The issue concerns the tax consequences of a contract between the taxpayer and its landlord whereby the taxpayer acquired the real estate in question and thus obtained cancellation of the lease. The taxpayer as tenant and at its own cost had erected a 22-story loft building on the leased premises, to belong to the taxpayer only as long as the lease was in force and at termination to be either razed or surrendered to the landlord, as the latter might direct. The lease had been renewed by the tenant for an additional 21-year term just before the contract of sale was entered into, although the tenant now urges that the annual rental of $118,840 was excessive, notwithstanding the very substantial rents it was collecting, sufficient at least to make the renewal desirable. Petitioner's main argument throughout this litigation has been that the difference between the purchase price of $2,100,000 and the unimproved value of the land, $660,000, namely the sum of $1,440,000, should be deductible as an ordinary business expense under I.R.C. § 23(a) as the price of cancellation of an onerous lease. Alternatively it suggested amortization of this amount over the unexpired term of the lease, or its depreciation as an additional cost of acquiring the already fully depreciated building. All this the Tax Court denied, although six judges dissenting thought that some part of the purchase price should be allocated to the additional rights thus acquired in the building and then be recovered through depreciation. 21 T.C. 817.

The Tax Court refused to permit deduction under I.R.C. § 23(a) because it considered the $2,100,000 contract price as payment for one complete bundle of rights of land ownership, more appropriately characterized as a capital asset than as an ordinary business expense. With this conclusion we are in agreement, despite the contrary opinion [fol. 22] of the Sixth Circuit in *Cleveland Allerton Hotel*

v. *C.I.R.*, 6 Cir., 166 F. 2d 805.[1] Whatever may be the case where a lease is cancelled without the purchase of a fee, we think that the situation here at hand consists of the acquisition of a definite and substantial property interest, so to be viewed for tax purposes. Petitioner, having certain rights in the property, bought all the remaining ones up to full ownership and is in the same situation as if it had bought out the share of a co-owner or an overriding easement or, indeed, a piece of land next door. Because petitioner also happened to be the tenant under the lease, its purchase resulted in the merger of the leasehold in the fee and gave it a good bargain. But that fact, while it may explain the motivation for the investment, cannot change its fundamental nature from the acquisition of a capital asset to mere removal of a burden or repair of plant. *Post* v. *C.I.R.*, 2 Cir., 109 F. 2d 135; *Herzberg* v. *Alexander*, D.C.W.D. Okla., 5 F. Supp. 334; *Boos* v. *C.I.R.*, 30 B.T.A. 882; and see *Willcuts* v. *Minnesota Tribune Co.*, 8 Cir., 103 F. 2d 947, 952, certiorari denied *Minnesota Tribune Co.* v. *Willcuts*, 308 U.S. 577. We reach this result whether or not the lease was in fact onerous to the taxpayer, as it contends; the Tax Court made no such finding and the evidence in this respect is doubtful at best. But that merely goes to the desirability or otherwise of the bargain; it does not define what was bought. We are equally in accord with the Tax Court that the purchase price of the fee is not to be amortized over the remaining term of the now nonexistent [fol. 23] lease. Since the taxpayer has acquired the complete title to the property in question, it obviously no longer has a wasting asset to come to a necessary end twenty-one years hence. See *Post* v. *C.I.R.*, *supra*, 2 Cir., 109 F. 2d 135; *Friend* v. *C.I.R.*, 7 Cir., 119 F. 2d 959, certiorari denied 314 U. S. 673. But we do think the view of

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[1] This case is criticized in Notes, 48 Col. L. Rev. 967 and 1 Stan. L. Rev. 147. Both notes suggest that the court erred in considering the investment to be other than a capital asset. Both equally reject the solution of the Tax Court in that case and this one that no depreciation whatever be allowed, suggesting as an alternative amortization over the remaining term of the lease.

the dissenting judges sound that here is a new purchase price covering a building to be recovered taxwise, as is any building cost, over the period of its useful life.

The taxpayer's second alternative raised this issue in arguing that $1,440,000 be added for depreciation purposes to the cost of the building which it erected on the property. The cost of $3,000,000 originally invested by it in the building was fully written off during the first 21-year term of the lease. From this, a majority of the Tax Court concluded that no further depreciation was allowable, since the taxpayer's cost of acquisition had been recovered. But the dissent seems more in accord with the realities of this situation. The taxpayer in acquiring this fee bought not only a reversionary interest in the land itself, but also a reversionary interest in the building which under the lease it would have had to surrender to the landlord when its term expired. A third-party purchaser of such a fee would be entitled to allocate part of its cost to the building and to depreciate it as such. Similarly, this taxpayer has made an additional investment in the building which should give rise to an added depreciation deduction in accordance with I.R.C. § 23(1).

On the present state of the record we cannot determine how much of the $2,100,000 purchase price is properly to be allocated to the land and how much to the building. The Tax Court has found only that in its unimproved state the land was worth $660,000. That appraisal cannot be con-
[fol. 24] sidered as conclusive of its present value, improved by a $3,000,000 building appurtenant thereto. We doubt if a merely mechanical apportionment will adequately fix the intrinsic value of the building reversion. Hence we must remand this case to the Tax Court to take evidence, if desired, and otherwise to fix this value. See *Cohan* v. *C.I.R.*, 2 Cir., 39 F. 2d 540, 543, 544. A similar adjustment should be made with respect to the legal fees of $16,500 incurred by the taxpayer in connection with this purchase. The value so found will be the cost to be recovered through yearly depreciation.

Reversed and remanded for further proceedings in accordance with this opinion.

[fol. 25] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILLINERY CENTER BUILDING CORP., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT—April 14, 1955

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and action remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 26] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed April 28, 1955

To the United States Court of Appeals for the Second Circuit and the Honorable Judges thereof:

The above named petitioner hereby respectfully petitions for a rehearing which the Court has inherent power to grant to prevent injustice, pursuant to Rule 25 of the Court's Rules and in support thereof shows:

The Court's opinion in this proceeding, filed April 14, 1955, holds (P. 1056-1057) that a payment made to obtain

the cancellation of a lease at the same time the land is purchased is not an allowable deduction under Section 23(a) of the Internal Revenue Code of 1939. While this conclusion may be proper in many instances, such as in *Herzberg v. Alexander*, 5 F. Supp. 334 and *Boos v. Commissioner of Internal Revenue*, 30 B.T.A. 882, it is not applicable to the facts in this proceeding.

Petitioner claims that the opinion of the Court does not consider the argument upon which the petitioner places [fol. 27] great reliance and which may not have been adequately stressed in the original argument before this Honorable Court.

The decision of this Court, denying the deduction of $1,440,000, was based on the theory that the taxpayer had paid $2,100,000 for a "complete bundle of rights of land ownership" and the situation was the same "as if it had bought out the share of a co-owner or an overriding easement or, indeed, a piece of land next door." Such conclusion failed to give consideration to a basic tax principle not sufficiently stressed in the argument advanced to the Court that payments must be considered in accordance with the purpose for which paid in determining the tax consequences to the taxpayer.

Thus, in *Western Wine & Liquor Co. v. Commissioner*, 18 T.C. 1090, a wholesale liquor dealer purchased some shares of American Distilling Co., which was offering its shareholders the right to purchase whiskey inventory at cost. After exercising these rights, the taxpayer sold the stock at a loss. The Tax Court, emphasizing that the taxpayer purchased the distilling stock not as an investment in stock but only to acquire more whiskey to replenish its inventories in order to sustain its business, held that the difference between the cost of the American Distilling stock and the selling price represented additional cost of the whiskey acquired. Certainly the vendor of the American Distilling stock to the taxpayer was selling his entire interest in the stock and all the rights that accrued therein but the Tax Court did not bottom its decision on such fact but on the intent of the vendee-taxpayer. This decision was appealed by the Government to the U. S. Court of Appeals, Eighth Circuit, but the appeal was dismissed. 205 F. 2d 420.

inherent therein was to acquire the assets and the amount paid for the stock was allocated to the real estate and other assets. Under this category would be the leading cases of *Prairie Oil & Gas Co. v. Motter*, 66 F. 2d 307; *Commissioner v. Ashland Oil & Refining Co.*, 99 F. 2d 588; certiorari denied, 306 U.S. 661; *Kopper Coal Co.*, 6 T. C. 1209.

Farm land or orchard land is often bought and sold with the crop thereon for a single amount but allocations have been recognized by the Commissioner and, where not, certainly by the Courts.

With regard to the principle of merger, the decision of *Laird Bell v. Carter H. Harrison*, 212 F. 2d 253, is applicable. In that case a trust remainderman purchased the life interest of his parents and amortized the cost of the life estates over the life expectancy of his parents. The Commissioner disallowed the deduction for amortization, contending there was a merger of the two estates, particularly in view of the fact that the plaintiff evidenced no intent to preserve the two interests separate and distinct, and that in view of this merger the capital invested could be recouped only at the time of sale or other disposition by way of being added to the cost basis of such property. The Court of Appeals (Seventh Circuit), sustaining the taxpayer, dismissed this argument of merger or "bundle of rights".

The decisions referred to by the Court, *Post v. Commissioner*, 109 F. 2d 135; *Herzberg v. Alexander*, D. C. W. D. [fol. 30] Okla. 5 F. Supp. 334; and *Boos v. Commissioner*, 30 B. T. A. 882, are not in point in that each pertains either to a taxpayer who was already a fee owner or a taxpayer who had acquired the lease interest as an investment; whereas in the instant proceeding the Millinery Center Building Corp. already owned the building, had a lease on the land, enjoyed the income therefrom and did not have to make any current payment to acquire an investment in the lease.

In *Post v. Commissioner*, *supra*, the taxpayer was the owner of the land, who at the same time had a leasehold interest arising from the tenant's destruction of an old building on his property in order to put up a new one. A few years later, the tenant's interest was sold on foreclosure sale to a new company, all of whose stock and securities

were received by the landlord, the landlord transferring his fee property to the new corporation. Here the landlord had not paid any amount to anyone and the accounting item of leasehold was merely transferred to the new company in exchange for the stock. There was no actual loss to deduct.

In *Herzberg* v. *Alexander*, *supra*, the taxpayer had purchased an unexpired lease for 8 years and 9 months of an original 10-year lease from the tenant for $5,000. In the next year the taxpayer purchased the land and building from the owners for a consideration of $63,500. Where a taxpayer pays the lessee a sum of money to take over a lease, it is obvious that the lease is not onerous but favorable to the tenant and less favorable to the landlord. Then, the property sold subject to a lease not favorable to a landlord would probably command less than the actual value of the land and building and the addition of the lease payment to the property cost would tend to compensate for this fact and give the fair market value.

To illustrate: property is leased at $10,000 per annum for a period of 20 years but after 5 years the rental value [fol. 31] of the property increases to $20,000 per annum. Because of the favorable low rent of $10,000 per annum, the tenant could sell his leasehold interest for $50,000. The landlord, however, subject to the low rent of $10,000 instead of the fair rental value of $20,000 finds that based on land values surrounding his property, his land should be worth $300,000; but he can only receive $200,000 because of the unfavorable lease. Now, if the new lessee, who has paid $50,000 to acquire the leasehold interest, purchases the land for $200,000, it would obviously be unjust and improper to allow him to write off that $50,000. That $50,000 is more properly added to the $200,000 purchase price to arrive at the actual value of the property purchased.

That is not the case in the instant proceeding where the tenant pays a sum of money to save paying excessive rent as well as being relieved from other onerous lease terms and where proof has been submitted that the actual value of the land is much less than $2,100,000.

In *Boos* v. *Commissioner*, *supra*, the taxpayer in 1927 acquired, at a cost of $25,000, a 99-year lease with option to purchase, and in the very next year exercised the option

and acquired the remainder interest. The facts in Boos indicate that the entire transaction can be considered one continuing transaction, making the taxpayer's cost the initial $25,000 and the $55,000 paid in the next year. Furthermore, when a taxpayer pays $25,000 to acquire a lease, it cannot very well argue that the lease was onerous and that the purchase of the property was to effect the cancellation of the lease.

In answer to the obvious question, why did the Millinery Center Building Corporation renew the lease in April 1945, it is respectfully submitted to the Court that the petitioner had a building thereon of substantial value, with a remaining [fol. 32] economic life of 30 years and assessed in excess of $2,100,000, which investment it desired to retain.

This Court raised the question of whether the lease was in fact onerous, although such fact or lack thereof was not determinative of the Court's decision. Petitioner respectfully points out that the Tax Court did find that "petitioner purchased the fee to be released from the terms of the lease. Petitioner was most concerned about the annual rental of $118,840, which it deemed excessive, and the contingent liability to remove the building from the premises at the expiration of the lease upon the request of the landlord." (A 8)

There was also undisputed expert and authoritative testimony that the fair rental value of the land was between $35,000 and $40,000 per annum in 1945, although the petitioner was paying $118,840. (R. 148, 168, 170).

It is not necessary to lose money for a lease to be onerous. When one is paying 2½ times the fair rental value, that in itself affords a basis for the taxpayer to pay a sum to cancel such a contract. (See *The Stuart Co. v. Commissioner*, Tax Court Memo. Opinion Docket 12413, Aff'd 195 F. 2d 176).

The Post, Herzberg and Boos cases may be further distinguished from the instant proceeding in that the principle expressed therein pertaining to minor interests becoming merged with major interests is not applicable here. According to the testimony at the Tax Court trial, the fair rental value for the land alone on which the Millinery Center Building was erected was between $35,000 and $40,000

per annum compared to the $118,840 being paid. The excess of rent to be paid for the next 21-years would be more than $1,600,000. To save this very substantial amount, and further substantial amounts in the event the lease was renewed, the taxpayer bought a piece of land worth $660,000. The purpose of this transaction was the saving of at [fol. 33] least $1,600,000 in rent and not the acquisition of a piece of land worth $660,000, which the taxpayer did not have to acquire in the first instance to enjoy the continued use of the premises. The purchase of the land was only incidental to and the only means by which the taxpayer could cancel an onerous lease and still retain its equity in the building which was productive of income. The transaction was not primarily to acquire land which only secondarily and incidentally resulted in the cancellation of the lease.

The result of this Court's opinion may be demonstrated in the following illustration. Assume a third party, desiring to make an investment, buys land and building for $2,100,000. The purchaser would make an allocation between land and building and depreciate the building over the period of useful life. Now suppose the building was erected by a tenant who has a leasehold running for 42-years. The purchaser would then be buying land and leasehold, which leasehold would be amortizable over the 42-year period, in accordance with decision of *Mary Young Moore* v. *Commissioner*, 207 F. 2d 265. Now, assume that the tenant of the leasehold wishes to do what the third party did and purchase the property for $2,100,000. Since he already has the lease he will not be acquiring a leasehold and since the lease is for a longer period of time than the life of the building, he may not be acquiring a reversionary interest in the building and therefore must be paying $2,100,000 for the land alone, even though the land is only worth $660,000. Following this argument further, the land, which is only worth $660,000 when an outsider buys it for an investment, suddenly becomes worth $2,100,000 when the leasehold tenant acquires it.

This Court, in its opinion, inferred that the value to be attributed to the land might be more than the $660,000 found by the Tax Court for the land unimproved. This [fol. 34] Court stated: "That appraisal cannot be consid-

cred as conclusive of its (land) present value, improved by a $3,000,000 building appurtenant thereto."

Petitioner respectfully points out that any value attributed to the land because of a building erected thereon makes the land a wasting asset, which is not contemplated by the Internal Revenue Code. There is no question that the building will eventually be of no economic value and therefore the land some day will be worth only the value of the land without any offsetting value for a building. To attribute an increased value to the land because of such a condition and not permit depreciation thereon means a taxpayer has a wasting asset, concurrent with the depreciation of the building which is not going to be recovered taxwise. This is contrary to every accounting principle and to the very meaning of Section 23 (l) of the Internal Revenue Code of 1939 and the Regulations promulgated thereunder.

In *Commissioner* v. *Stary Brothers*, 204 F. 2d 673, this Court held that an amount received by a dealer from a drug manufacturer in exchange for releasing the manufacturer from its contract obligation not to sell other dealers was ordinary income and did not constitute the sale of a capital asset. The Court agreed the taxpayer's rights were undoubtedly property but held the *termination of a contract is not a sale or exchange.* The property rights were not transferred, they merely came to an end and vanished. This case applied to the Millinery Center Building Corporation proceeding makes the answer clear—there were no property rights acquired by the Millinery Center Building Corporation in the cancellation of the lease. Whatever property rights to the excessive rent existed were not transferred as if to a third party purchaser but "merely came to an end and vanished." There was no "bundle of [fol. 35] of rights" to the Millinery Center Building Corporation and the amount paid to secure such vanishment was an ordinary and necessary expense and an allowable deduction.

It is stressed before the Court that the deduction of $1,409,000 or any part thereof does not result in a net tax loss to the Treasury but only compensates in part for the additional tax that is going to be paid by the petitioner in each year for at least the next 21 years. The petitioner's

returns for 1945 and ensuing years no longer reflect the deduction of rent expense of $118,840. Its land investment entitles it to a saving in rent from $35,000 to $40,000 per annum, but the balance of approximately $80,000 the taxpayer is saving because it incurred the expense of $1,440,000, and it is paying tax on such $80,000 each and every year without any offsetting deduction, and at the end of 30 years it will have a land asset of only $660,000. This is an unconscionable deprivation of capital of this taxpayer.

Petitioner therefore respectfully requests a rehearing upon these points at the Court's convenience. Should further oral argument be deemed impractical, petitioner requests that consideration be given to the points set forth herein.

Respectfully submitted, Bernard Weiss, Counsel for Petitioner on Review, 136 East 57th Street, New York 22, N. Y.

April , 1955.

[fol. 36] CERTIFICATE OF COUNSEL

I, Bernard Weiss, do hereby certify that I am Counsel of Record for petitioner on review in the above entitled proceeding; that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay or vexation, and that in my opinion it is well founded in law and fact and proper to be presented to the Court.

Bernard Weiss, Counsel for Petitioner on Review.

[fol. 37] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

RULING ON PETITION FOR REHEARING — May 18, 1955

PER CURIAM:

Petition for rehearing denied.

C. E. C., J. N. E., U. S. C. J.J.; C. C. G., U. S. D. J.

[fol. 38] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 18, 1955

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 39] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 39A] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Where a lessee, the owner of a valuable building on leased land, acquires the fee to the land to be relieved of what it considers to be the burdensome terms of a lease, may the lessee deduct the excess of the payment over the determined value of the land at the date of purchase as an ordinary expense of doing business under § 23(a) of the United States Internal Revenue Code of 1939 or under 23(f) as a loss on a transaction entered into for profit and not compensated for by insurance or otherwise.

"2. In the alternative, may the lessee-petitioner consider the excess payment over the determined value of the land to be in the nature of a prepayment of rent

for the remaining term of the extinguished lease and amortize such amount over 21 years."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 40] BEFORE THE TAX COURT OF THE UNITED STATES

EXHIBIT 3-C

This Agreement made the 11th day of May, 1945, between Wendel Foundation, a New York corporation, party of the first part, hereinafter designated as the Seller; and Millinery Center Building Corporation, a New York corporation, having its principal office at No. 525 Seventh Avenue, Borough of Manhattan, City of New York, party of the second part, hereinafter designated as the Purchaser;

Witnesseth that the Seller agrees to sell and convey and the Purchaser agrees to purchase:

All those certain lots, pieces or parcels of ground, situated in the Borough of Manhattan of the City and State of New York which taken together are bounded and described as follows:

Beginning at a point formed by the intersection of the Northerly line of Thirty Eighth Street with the Easterly line of Seventh Avenue; running thence Easterly along the Northerly line of Thirty eighth Street, Two Hundred feet (200'); running thence Northerly at right angles with Thirty Eighth Street, Ninety Eight Feet and Nine inches (98' 9") to the center line of the block between Thirty Eighth Street and Thirty Ninth Street; running thence Westerly along said center line of the block Two Hundred feet (200') to the Easterly side of Seventh Avenue; running thence Southerly along the Easterly side of Seventh Avenue Ninety Eight feet and nine inches (98' 9") to the point or place of beginning.

[fol. 41] Being the same premises described in lease dated April 30, 1924 by Rebecca A. D. Wendel Swope and Ella V. Von E. Wendel to Millinery Center Building Corporation, recorded in the Register's Office of New York County in Liber 3448 of Conveyances at Page 71.

The price is Two Million One Hundred Thousand Dollars ($2,100,000.) payable as follows: Two Hundred Ten Thousand Dollars ($210,000.) on the signing of this contract, receipt whereof by check subject to collection is hereby acknowledged, the non-payment of which check in due course shall give Seller the option of cancelling this agreement; and the balance, One Million Eight Hundred Ninety Thousand Dollars ($1,890,000.) on the delivery of the deed as hereinafter provided, by certified check satisfactory to the Seller, the check to be drawn to the order of the Seller and payable through the New York Clearing House.

The premises shall be conveyed subject to zoning restrictions; to the right of the City of New York to require the removal or closing up of any coal chutes or vaults under the streets or highways adjoining the premises and to any unpaid permit or vault fees with respect thereto; to encroachments, if any, upon the adjoining streets or highways by windows when open, show windows, terra cotta piers on the third story balcony at the nineteenth story, ledges, cornices, window sills, trim, standpipes, signs, marquees, vault lights and sidewalk elevator doors; to encroachments, if any, upon adjoining properties by exhaust pipes from windows of building on premises to be conveyed and by windows of said building when open; and to any other state of facts that an accurate survey would show.

[fol. 42] The premises shall also be conveyed subject to that certain lease made by Rebecca A. D. Wendel Swope and Ella V. Von E. Wendel to Millinery Center Building Corporation, dated April 30, 1924, and recorded in the Register's office of New York County in Liber 3448 of Conveyances at Page 71 and to all agreements amending, modifying, renewing or extending the same, (with all of which the Purchaser is familiar, being the tenant thereunder), to the rights of sub-tenants, under-tenants and occupants of the premises, to any mortgages, liens or other encum-

brances on the leasehold estate, to mechanic's liens, if any, against the fee or lease hold suffered by the tenant to remain undischarged at the time of the delivery of the deed, to any notes or notices of violation of law or Municipal ordinances, orders or requirements affecting the premises, noted in or issued by any State or Municipal Bureau or Department which shall not have been complied with or removed at the time of the delivery of the deed, to all taxes, assessments, or water charges unpaid at the time of the delivery of the deed, and to any and all other liens, encumbrances or charges upon the fee or leasehold estate for the payment or discharge of which the tenant is responsible under the terms of the aforesaid lease, as modified, amended, extended or renewed by said agreements.

Seller shall execute upon request of Purchaser an agreement cancelling and terminating said lease as of the time of the actual closing of title hereunder. It is agreed, however, that regardless of whether Purchaser accepts title to the premises subject to the afore-mentioned lease or elects to have an agreement cancelling and terminating same, the idemnity [*sic*] agreements of Purchaser con- [fol. 43] tained in the said lease shall continue in full force and effect after closing of title in favor of the Seller with respect to any liabilities or obligations of Seller assumed by or imposed upon it by the terms of the lease or any such agreements of amendment, modification, extension or renewal or arising out of Seller's ownership of the said premises.

The premises shall also be conveyed subject to all laws or regulations now existing or hereafter enacted by the Federal, State or Municipal Governments or authorities regulating or restricting the amount of rent which may be charged for the whole or any part of the premises or the term of occupancy of any tenant or under-tenant, or the services to be rendered to any tenant or under-tenant, or affecting in any other manner the rights or obligations of any landlord or tenant of the premises.

This sale covers all right, title and interest, if any, of the Seller in any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the centre-line thereof, and all right, title and

interest of Seller in and to any award made or to be made in lieu thereof, and in any award for damage to said premises by reason of change of grade of any street; and the Seller will execute and deliver to the Purchaser on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

If any loss or damage to the building on the premises by fire or other cause shall occur and such loss or damage shall not have been replaced, restored or repaired prior to the date of closing title hereunder, the fact that the build- [fol. 44] ing has not been replaced, restored or repaired shall not relieve Purchaser of its obligation to complete this contract in accordance with its terms provided Seller shall, upon closing of title, turn over to Purchaser or assign to the Purchaser all its right and interest in any monies deposited with Seller or over which Seller may have any control (including insurance monies and monies deposited by tenant and surety bonds deposited in lieu of such funds) for the purpose of repairing, restoring or replacing the building, less any part of such funds as may have been lawfully expended in accordance with the terms of said lease.

The deed shall be in proper statutory short form for record in the usual form of a Bargain and Sale deed containing no covenant or warranty and shall be duly executed and acknowledged by Seller at Seller's expense, including the cost of the prescribed United States revenue stamps thereon so as to convey to the Purchaser the fee simple of said premises free from all encumbrances except as herein stated.

The deed shall be delivered on the receipt of said payments at the office of Stewart & Shearer, No. 45 Wall Street, Borough of Manhattan, City of New York, on the 11th day of June, 1945, at ten-thirty o'clock in the forenoon, or at the option of Purchaser, on an earlier business day on five (5) days' written notice to Seller. Rents shall be apportioned as of the date of the delivery of the deed.

This contract and all rights thereunder may be assigned by the Purchaser by proper written and acknowledged assignment delivered to the Seller on the closing of title

provided that written notice thereof with the name and [fol. 45] residence of the assignee be delivered to the attorneys for the Seller not less than five (5) days prior to the delivery of the deed.

The Seller represents that the execution by the Seller of this agreement is not prohibited by the President's Executive Order No. 8389, as amended.

The Purchaser represents that the execution by the Purchaser of this agreement is not prohibited by the President's Executive Order No. 8389, as amended.

If the Seller shall be unable to convey title in accordance with the terms of this agreement the sole obligation of the Seller shall be to refund the Purchaser's down payment and to reimburse the Purchaser for the expense incurred in the examination of title, not exceeding the usual charge of a title company therefor. The Purchaser may, however, accept such title as Seller may be able to convey without reduction of the purchase price or claim for damages and it is agreed that Seller shall not be required to bring any action or proceeding or to incur any expense in order to cure any defects in title, and the acceptance of a deed by the Purchaser shall relieve the Seller of any further obligations to the Purchaser under this contract, except as herein otherwise expressly provided.

All sums paid on account of this contract and the reasonable expense of the examination of title to said premises (not to exceed the usual charge of a title company therefor) are hereby made liens thereon but such liens shall not continue after default by the Purchaser under this contract.

The stipulations aforesaid shall apply to and bind the heirs, legal representatives, successors and assigns of the respective parties.

[fol. 46] In Witness Whereof, the parties hereto have executed this agreement, in duplicate, the day and year first above written.

Wendel Foundation, By: (signed) George L. Shearer, President. Millinery Center Building Corporation, By: (signed) A. Simonson, President.

Before the United States Tax Court

Exhibit 6-F

This Agreement, made June 11th, 1945, between Weidel Foundation, a New York corporation having its principal office at 45 Wall Street, Borough of Manhattan, City, County and State of New York (hereinafter called the "Landlord") and Millinery Center Building Corporation, a New York corporation, having its principal office at 525 Seventh Avenue, Borough of Manhattan, City, County and State of New York, (hereinafter called the "Tenant"), Witnesseth:

Whereas, the predecessors in title of the Landlord by lease dated April 30, 1924, leased to the Tenant for the term of twenty-one (21) years ending April 30, 1945, the land and premises located on the northeast corner of Seventh Avenue and 38th Street, fronting 200 feet on 38th Street and 98 feet 9 inches on Seventh Avenue, Borough of Manhattan, City, County and State of New York, more particularly described in said lease, which lease was recorded in the Register's office in New York County on October 10, 1924, in Liber 3448 of Conveyances, Page 71 [fol. 47]. Whereas, the said lease was modified and amended by agreement dated November 30, 1935, and recorded in said Register's office on October 15, 1936, in Liber 3942 of Conveyances, at Page 80; and

Whereas, the said lease was renewed and extended for a further term of twenty-one (21) years ending April 30, 1966, by an agreement in writing dated April 16, 1945, and recorded in the Register's office on April 18, 1945, in Liber 4349 of Conveyances, Page 596; and

Whereas, the Tenant requested the Landlord to accept a surrender of the demised term and the Landlord agreed to accept such surrender provided this agreement was executed simultaneously with the execution of the formal agreement of surrender, which formal agreement of surrender is being executed and delivered simultaneously herewith;

Now, Therefore, in consideration of the premises and the sum of One Dollar ($1.00) and other good and valuable consideration by each of the parties hereto to the other in hand paid, receipt whereof is hereby acknowledged, the

parties hereto do hereby mutually release one another and their successors and assigns from any and all obligations under said lease and modification agreement and under said agreement of renewal and extension thereof, except that the indemnity agreements of the Tenant contained in said lease shall continue in full force and effect after such surrender in favor of the Landlord with respect to any liabilities or obligations of Landlord assumed by or imposed upon it by the terms of the lease or any agreements of amendment, modification, extension or renewal or arising out of Landlord's ownership of the said premises.

[fol. 48] In Witness Whereof the parties hereto have signed, sealed and delivered this instrument on the date first above written.

Wendel Foundation, By: (signed) George L. Shearer, President.

(Seal of Wendel)

Millinery Center Building Corporation, By: (signed) A. Simonson, President.

[fols. 1-21-36] EXHIBIT 1-A

REBECCA A. D. WENDEL SWOPE,

AND

ELLA V. VON E. WENDEL,

WITH

MILLINERY CENTER BUILDING CORPORATION

LEASE—Dated April 30th, 1924

Affecting Premises on the Northeast Corner of Thirty Eighth Street and Seventh Avenue

[fol. 37] Sixth: That the title to all buildings all alterations and all other improvements and fixtures and to all boilers, machinery, elevators, apparatus, electric and gas

fixtures, equipment, decoration, furnishings, and all personal property used by the Tenant, its successors or assigns, in the maintenance and operation of the said demised premises and all replacements and betterments that shall be erected, made or placed on the demised premises by the Tenant, its successors or assigns, shall be the property of the Tenant, its successors or assigns, but at the expiration of the demised term or other sooner termination thereof, or, if this lease shall be renewed as hereinafter provided, at the expiration of the last term for which the same shall be renewed or other sooner termination thereof, at the option of the Landlords, their heirs, successors or assigns, shall [fols. 38-48] vest in the Landlords, their heirs, successors and assigns forever and become at that time their property free from any and all right, title or interest of the Tenant, its successors or assigns therein.

Seventh: That after the said new buildings on the demised premises have been erected as hereinbefore provided, the same shall not be taken down or removed or be substantially or structurally altered without the written consent of the Landlords, their heirs, successors or assigns, to such alteration, which consent shall not be unreasonably withheld, except that, on the order of proper governmental authority that the Tenant has covenanted for itself, its successors and assigns, to comply with as hereinafter provided, necessary alterations and improvements may be made. The Tenant, for itself, its successors and assigns hereby covenants that all alterations and improvements shall be done in a first-class manner, out of materials and with workmanship in keeping with the quality and class of the building or buildings affected, and to the reasonable satisfaction of the landlords, their heirs, successors or assigns.

[fol. 49] Fourteenth: That in the event of any or all of the building or buildings at any time or times upon the demised premises or part thereof being destroyed or injured by fire or any other cause whether rendered untenantable or unfit for occupancy or not, neither the Tenant, its successors nor its assigns shall have the right at any time or times to quit

any portion thereof, neither shall the Tenant, its successors nor its assigns shall have the right at any time or times to quit or surrender possession of the leasehold property or of any portion thereof, neither shall the Tenant, its successors or assigns thereby be released from any of its or their obligations under this lease, neither shall the rent reserved under this lease thereby cease or be withheld or in any way diminished by reason thereof, and the Tenant, for itself, its successors and assigns hereby waives any rights conferred upon it or them under or by virtue of Section 227 of the Real Property Law in this State, or otherwise, [fol. 50] to quit and surrender possession of the demised premises in such event and shall not thereby relieve itself or themselves of its or their obligations under this lease.

Fifteenth: That in case of the damage or destruction of any building or buildings erected on the demised premises during the term of this lease, or any part thereof (including plate glass) by fire, or otherwise, at any time or times, the Tenant, its successors or assigns, with all reasonable dispatch, subject to delays on account of strikes or other causes beyond the control of the Tenant, its successors or assigns or to its or their inability with due diligence to obtain materials, and at its or their own cost and expense, shall repair, restore, rebuild or replace any such building or buildings or any part thereof (including plate glass), so damaged or destroyed.

(1) In the event of a partial destruction of the building or buildings affected and new plans are not required by law to be filed with or approved by public authority, the said building or buildings shall be repaired, restored and rebuilt by the Tenant, its successors or assigns at its or their own cost and expense in accordance with the plans and specifications originally approved by the Landlords, in a first-class manner in keeping with the quality and class of the building or buildings affected and so as to place the same in as good, usable and tenantable condition as they were required to be by the terms of this lease before such damage, and to the satisfaction of the Landlords, their heirs, successors or assigns, but such approval shall not be unreasonably withheld. But in case such building or buildings cannot legally be so repaired, restored and rebuilt, it

or they shall be repaired, restored and rebuilt by the Tenant, its successors or assigns, in a manner reasonably satisfactory to the Landlords, and the mortgagee if any, on the leasehold estate, their heirs, successors or assigns, or if said parties cannot so agree, then the matter shall be sub-
[fol. 51] mitted to and decided by the arbitrators under Article Fortieth hereof, so that the restored building or buildings shall be at least equal in value and in quality and class to those so damaged.

(2) Or, in the event of the total destruction of such buildings or any of them, the Tenant, its sucessors or assigns shall, at its or their own proper cost and expense with all reasonable dispatch and at least within two years from the time of such destruction, subject to delays on account of strikes or other causes beyond the control of the Tenant, its successors or assigns, or to its or their inability with due diligence to obtain materials, erect a new building or buildings in place thereof (of the same type and order as the building or buildings so destroyed) at least equal in value to the building or buildings so destroyed, but in case such new building or buildings cannot legally be erected, and if the parties, including any mortgagee of the leasehold estate if any there be, cannot agree upon the type and order of the building or buildings to be erected, the matter shall be submitted to and decided by the arbitrators as provided in Article Fortieth hereof, so that the building or buildings so erected shall be at least equal in value and in quality and class to those so destroyed.

(3) In all cases of partial destruction where plans are required by law to be filed with or approved by public authority before restoring, repairing, rebuilding or replacing and in all cases of the erection of a new building or buildings, all such restoring, repairing rebuilding, replacing and erecting shall be done in accordance with plans and specifications approved by the Landlords, their heirs, successors or assigns, after the examination thereof by an architect appointed by the Landlords, their heirs, successors or assigns; a copy of which said plans and specifications authenticated by the respective signatures of the agents or attorneys for the Landlords, their heirs, successors or as-
[fol. 52] signs and an officer of the Tenant or its successors

or assigns shall be filed with the Landlords, their heirs, successors or assigns; that the said improvements and buildings shall be made and erected in accordance with the said plans and specifications, and at all times subject to the inspection and report of said architect and to the approval of the Landlords, their heirs, successors or assigns; that the Tenant or its successors or assigns shall and will pay to the said architect his compensation at the rate and at the times hereinafter specified for such services, and on the default of the Tenant or its successors or assigns in so doing the Landlords, their heirs, successors or assigns may pay the same with such interest as may be due to the architect thereon, and the amount of such payment shall become immediately due from the Tenant or its successors or assigns as further rent under this lease with interest thereon at the rate of six per cent per annum from the date of such payment; and that the Landlords, their heirs, successors or assigns shall have the right, which they hereby reserve for themselves and their agents, to enter upon said demised premises and inspect the work in progress at any time; but the approval or approvals provided for in this paragraph shall in no case be unreasonably withheld. That changes or alterations in or to the building may be made by the Tenant, its successors or assigns, after the Landlords, their heirs, successors or assigns have approved the plans and specifications, only after obtaining the Landlords', their heirs', successors', or assigns' consent in the following manner: The Tenant, its successors or assigns shall prepare and submit to the Landlords, their heirs, successors or assigns, plans and specifications embodying such changes or alterations, and the Landlords, their heirs, successors or assigns shall have thirty days after submission thereof for consideration and if the proposed changes or alterations [fol. 53] are safe and sound from an engineering standpoint and will not materially lessen the value of the building and are in conformity with the requirements then existing for the proper use of the buildings, the Landlords, their heirs, successors or assigns shall then give their written consent to the making of such changes or alterations. In the event the parties cannot agree as to such changes or alterations the question of whether they should

be made shall be submitted to arbitration as provided in Article Fortieth hereof.

(4) But in the event of the total or any partial destruction of the building or buildings on the demised premises or any of them for which there are actually received insurance moneys less than the actual cost of restoration and rebuilding (including as part of such actual cost, architect's fees and superintendent's fees and the cost of fire insurance and usual carrying charges during construction) before beginning the operation of the restoration or rebuilding of such building or buildings, the Tenant, its successors or assigns shall pay to the parties holding such insurance moneys (including the Landlords, their heirs, successors or assigns) an amount which with such insurance moneys shall equal such actual cost of restoration and rebuilding, all of which moneys are to be held and paid out in accordance with the provisions of Article Sixteenth relating to the disposition and disbursement of insurance moneys; but in lieu of making such additional payment the Tenant, its successors or assigns shall have the option to deliver to the Landlords, their heirs, successors or assigns a bond (hereinafter called rebuilding bond) in an amount equal to the actual cost of the new building or buildings (including as part of such actual cost, architects' and superintendents' fees and the cost of fire insurance and usual carrying charges during construction) to replace destroyed buildings and the equipment thereof or to the actual cost of the restoration and rebuilding of a building or buildings damaged to the extent [fols. 54-58] aforesaid, as the case may be, executed by itself or themselves and a surety company or companies, reasonably satisfactory to the Landlords, their heirs, successors or assigns, and in the form reasonably satisfactory to the latter, containing the same guarantee to the Landlords, their heirs, successors or assigns in reference to the building or buildings now being considered and the same provisions as to the reduction of the liability thereon as are provided to be contained in the bond or bonds hereinbefore agreed to be given on the execution of this lease in reference to the original new buildings agreed to be erected by the Tenant, its successors or assigns, with such changes as the nature of the case may require to make said guarantees ap-

propriate to the building or buildings now being considered and to the covenants of the Tenant, for itself and its successors and assigns herein contained in reference thereto.

(5) But, if, in any case of such loss, damage or destruction any insurance company, pursuant to its policy of insurance against the said loss, damage or destruction, shall properly elect to repair, restore, rebuild or replace the building or buildings or parts thereof (including plate glass) lost, damaged or destroyed instead of paying therefor in money, it is hereby mutually agreed that the Tenant, its successors and assigns shall not be required to repair, restore, replace and rebuild so much of such building or buildings or parts thereof (including plate glass) as shall have been repaired, restored, replaced or rebuilt by such insurance company.

[fol. 59] Eighteenth: That neither the Tenant, nor its successors nor assigns shall at any time or times hereafter during the term hereby granted, lease, let or demise the said premises as a whole, or assign, transfer or make over this present lease or any of said term therein demised to any person, persons or corporation without the written consent of the Landlords, their heirs, successors or assigns, to each and every proposed assignment or transfer, but such consent shall not be unreasonably withheld; but nothing herein contained shall apply to an assignment pursuant to a sale in foreclosure of a mortgage of the leasehold estate, nor prevent the Tenant, its successors or assigns from subletting without such consent, provided no such sub-lease covers the entire premises. The right conferred by this Article to assign the lease or leasehold estate or to sublet is a continuing right which shall not be exhausted by any one such assignment or subletting, but which shall inure to the [fols. 60-62] benefit of each successive assignee, including a purchaser at a foreclosure sale, during the term of said lease or any renewals thereof, subject, however, to all the covenants and conditions of this lease, which shall be assumed by every assignee, and provided notice of such assignment shall have been given to the Landlords, their heirs, successors and assigns, in the manner and of the substance and form hereinafter provided.

[fol. 63] Twenty-fourth: That the Tenant, its successors and assigns shall and will, at the expiration of this lease or

other sooner termination thereof, or, if this lease shall be renewed as hereinafter provided, at the expiration of the last term for which the same shall be renewed, or other sooner termination thereof, well and truly surrender and deliver up the premises hereby demised, including at the option of the Landlords, their heirs, successors and assigns, the buildings and improvements thereon, free and clear of incumbrances, into the possession of the Landlords, their heirs, successors or assigns without fraud or delay; and the Tenant hereby expressly covenants and agrees for itself, its successors and assigns that the property so surrendered shall at the option of the Landlord, their heirs, successors and assigns, include all new buildings, structures, improvements and the appurtenances and fixtures, and also at such option all boilers, machinery, elevators, apparatus, electric and gas fixtures, equipment and all personal property used [fo. 64] in the maintenance and operation of the said demised premises and all replacements and betterments erected, made or placed upon the demised premises by the Tenant, its successors or assigns during the term of this lease or any renewal thereof, it being expressly understood and agreed by and between the parties hereto that all buildings, improvements, appurtenances, fixtures, and property above enumerated at the expiration of the term of this lease or other sooner termination thereof, or if this lease shall be renewed as hereinafter provided, at the expiration of the last term for which the same shall be renewed, or other sooner termination thereof, shall become, be and remain at their option the property of the Landlords, their heirs, successors and assigns and that neither the Landlords, nor their heirs, nor their successors, nor their assigns are or shall ever be obligated to pay any sum of money whatever to the Tenant, its successors or assigns for, or on account of said property, or any of it.

Provided, however, and this lease is upon the express condition and the tenant expressly covenants and agrees that if the Tenant, its successors or assigns, shall make default in the payment of any instalment or instalments of the rent hereby reserved or of any other sum provided to be paid under this lease on any day upon which the same ought to be paid, and if such default shall continue for sixty days and the Tenant, its successors or assigns, shall have had

thirty days notice of such default given either before or after the expiration of said sixty days or if the Tenant, its successors or assigns shall execute, do, commit, permit or suffer any deed, act, matter or thing contrary to any covenant or agreement on its or their part herein contained or shall fail in the performance of any of either of the covenants, conditions or provisos in these presents contained which on the part or behalf of the said Tenant, its successors or assigns, are or ought to be observed, performed, fulfilled [fols. 65-106] or kept and if such default, defect, failure, deed, act, matter, thing, event or situation complained of shall continue for sixty days and the Tenant, its successors or assigns shall not make good and remedy the same within thirty days after written notice from the Landlords, their heirs, successors or assigns, specifying the matter complained of, given either before or after the expiration of said sixty days (except that in case of default in the completion of the building and improvements provided for in Article Fourth of this lease if the Tenant, its successors or assigns, shall not make good and remedy the same within two years after written notice of such default from the Landlords, their heirs, successors or assigns), then in each of said cases it shall and may be lawful for the Landlords, their heirs, successors and assigns, at their election into and upon the said demised premises or property or any part thereof in the name of the whole to re-enter and repossess (by summary proceedings or otherwise) and to remove any persons therefrom and the same to have, hold and enjoy again as and of their first estate and interest therein and thereupon and from thenceforth this lease and the estate hereby granted (except for the remaining liability of the Tenant, its successors and assigns) shall cease and determine and the violation of or failure to observe any covenant or condition with respect to any portion of the premises hereby demised shall entitle the Landlords, their heirs, successors and assigns at their election to re-enter upon the entire premises subject, however, to the same conditions as to delay and notice appropriate to the particular violation or failure as hereinbefore in this Article set forth.

[Vols. 167-115] Official Report of Proceedings before The Tax Court of The United States

Docket No. 36321

Millinery Center Building Corp. (now Fashion Center Building Corp.), Petitioner

vs.

Commissioner of Internal Revenue, Respondent

Hearing at New York, New York

Date, May 5, 1952

Pages 1-98

[Vol. 116] Abraham Simonson was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

[Vol. 117] Direct examination.

By Mr. Weiss:

Q. In the year 1945 what position did you hold in the Millinery Center Building Corporation?

A. I was president.

Q. In that capacity did you negotiate for the purchase of the fee upon which the Millinery Center Building was located?

A. I did.

Q. In April 1945 did the Millinery Center Building Corporation renew its ground lease with the Wended Foundation for a period of 21 years?

A. We did.

Q. Did your corporation have an option to renew for a further period of 21 years, beginning May 1, 1966?

A. Yes.

Q. Since you had just renewed this lease for 21 years and had the use or possession of the land and building for at least that long and you had an option to renew for an additional 21 years, what motivated your purchasing the fee?

A. I considered—we considered, rather, that—I use round figures—$119,000 instead of 118 something. Is that all right with your Honor?

The Court: Yes.

The Witness: We considered $119,000 a year in rental [fols. 118-125] based on the land value there in 1944 as being very excessive, and besides we had a real serious contingent liability.

By Mr. Weiss:

Q. Will you please explain what you mean by the contingent liability?

A. Well, there was a building there that at the end of the term of the lease we could be asked to remove, and to remove that sort of a building did not mean pennies. It meant a good deal of money. Then under the lease to pay $119,000 for 21 years besides real estate taxes and maintenance, et cetera, we saw a chance of saving a good deal of money. Practically the same land opposite to us on the corner of South—the Southeast corner of 7th Avenue and 38th Street was sold for $600,000. And a rent of $119,000 for our size plot compared with the plot across the street was very excessive.

And of course we always thought of the liability of taking off that building, which meant something to us.

Q. In valuing this land, you said that it had a value of roughly $600,000. What factors do you base this estimate on?

A. As a matter of fact, that land sold for $600,000 in 1944.

Q. You are talking about the property immediately across the street from yours?

A. Right across the street from us, opposite to us.

[fol. 126] The Witness: The $1,500,000 we had to pay there for this thing in itself could mean a big savings because a rental—our rental for 21 years would run to two and one half million dollars. You figure that difference on this renewal and then we had another renewal of 21 years which would figure another two and one half million dollars. To my mind that was a terrific saving as far as rent.

We always considered this building that was on it, that if we ever had to leave and were asked to take it off, it was a

liability that would cost lots of money if they wanted the ground restored to its original condition.

By Mr. Weiss:

Q. For what purpose is the Millinery Center Building being used by its tenants?

A. We have stores and lofts.

Q. What is the type of construction of the Millinery Center Building?

A. Steel, concrete and brick.

Q. How high is the Millinery Center Building?

A. We have the stores, have 21 floors of lofts, and we have a penthouse atop of the building.

Q. Since you considered that the annual net rental of $118,000 was excessive, why did you renew the lease in April of 1945?

A. Well, that is simple. We had an investment there of [fols. 127-142] $3,000,000. We could not take that building off that land and carry it away with us.

[fol. 143] Whereupon, DAVID A. HARRIS was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Weiss:

Q. What is your full name?

A. David A. Harris.

Q. What is your occupation?

A. Real estate broker.

Q. What is the nature of the business you are engaged in?

A. I am a senior partner of Harris, Newmark & Company, which is a management and leasing business. And I am vice-president of Lefcourt Realty, which owns about [5,000,000 in real estate, and president of the 515 Seventh Avenue Corporation; and I am officer of a lot of other corporations which are not necessary to stipulate here.

Q. These other properties that you were talking about, are they located somewhere in the vicinity of the taxpayer's building?

A. A great number of them, yes.

Q. In March 1944 did you in association with others pur-
[fol. 144] chase a property located at the southeast corner of 38th Street and 7th Avenue?

A. Yes. I bought that with Mr. W. I. Timken of Timken Roller Bearings.

Q. What was the price you paid for it?

A. 600.

Q. 600,000?

A. $600,000, yes.

Q. Will you describe the property, please?

A. Yes. It was 100—well, it is 98.9 on 7th Avenue by 200 on the 38th Street.

Q. Did that property have any structure on it at the time?

A. Yes, it had some old beaten up shanties which had never been improved and a lumber yard.

Q. Now, what is the physical relationship of this piece of property that you are testifying to that you purchased, with respect to the property of the petitioner in this case?

A. Immediately across the street. Just south of it.

Q. And from whom did you purchase this property?

A. The Wendel Foundation.

Q. That is the same party that sold the petitioner their property, is that right?

A. That is right.

Q. Did you offer your property, that is the plot on the
[fol. 145] southeast corner of 38th Street, for sale in the year 1945?

A. Yes.

Q. What was the price at which you offered this property?

A. We were willing to take a little loss, and the reason for that was that the government restrictions were so tight we could not do anything with the property, that plus the restrictions of the state rent laws made it impossible to handle it.

Q. What was the price at which you did offer it?

A. We would have lost five or ten thousand dollars if we could have got a ready purchaser.

Q. Did you sell this property at any time thereafter?

A. Yes.

Q. When was it sold and for what consideration?

A. We sold it to the Lefcourt Realty for $750,000 subsequently.

Q. What year was this?

A. That was 19— I think it was 1948.

Q. At that time were the restrictions off?

A. Yes.

Q. You have testified that you are familiar with the property of the petitioner, —

A. Yes.

Q. — it being across the street from your property. Based [fol. 146] on your experience and expert knowledge, what was the value of land in 1945 on which the Millinery Center Building stood?

Mr. Madden: Objection, if the Court please.

Mr. Weiss: All right, I will ask —

The Court: On what grounds?

Mr. Madden: I do not believe this witness has been shown to be qualified to give an expert opinion as to land values, if the Court please.

Mr. Weiss: I would like to qualify the witness.

By Mr. Weiss:

Q. Will you state how long you have been in the real estate business?

A. I have been in the real estate business for just 25 years this year, and spent most of that time in the garment center, almost all of the 25 years we made our headquarters down there, and we handle between 75 million and 100 million dollars worth of real estate at this moment.

Q. Again on the basis of your own experience and expert knowledge, what would you say is the value of the land?

A. Are you speaking —

Q. In 1945?

A. Are you speaking of land per se?

Q. The land exclusive of any improvement of any kind being on the property.

[fol. 147] A. $30 was a fair value at that point.

Q. You mean $30 a what?

A. $30 a square foot, sir.

Q. $30 a square foot?

A. That is right.

Q. You base that on what?

A. On the plot adjacent to 525 7th Avenue that the Wendels owned, that was 45,000 square feet and sold before we sold ours for $1,250,000, and they were hung up with it for quite some time, and the original purchasers lost money on it.

Now there has a big building been erected subsequently known as 1407 which entirely surrounds 525.

Q. When you say 1407, you mean 1407 Broadway?

A. 1407 Broadway, yes, sir.

Q. And this property which is called 1407 Broadway and fronts on Broadway also has a——

A. Has 100 feet on Seventh Avenue, on the corner of 39th Street.

We also had 501 Seventh Avenue which we managed for Mr. Timken which was just south of 515 Seventh Avenue, 24,300 square feet, 17 story building, similar occupancy as 525 Seventh Avenue.

Q. Did you offer your plot on the southeast corner of 38th Street and Seventh Avenue for rent in the years 1944 and 1945?

[fols. 148-155] A. For rent?

Q. Yes.

A. Well, we tried it. We were listening but we didn't get anything. Nothing developed. We would have liked to have at that point gotten anywheres from 35 to 40 thousand net per annum on it. We would have been glad to bail out.

Q. Would you say that $35,000 to $40,000 would have been a fair rental at that time?

A. Predicated on 6 per cent return of investment as free and clear.

Q. Would you say the fair rental value of the similar plot of or similar parcel of property located on the other side should bring about the same figure you now mention?

A. Yes. The big insurance companies have established that. In other words they would buy land under a building to permit them between five and six per cent.

Mr. Weiss: That is all.

[fol. 156] Whereupon, Edwin Mayer was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: My name is Edwin Mayer, residing at 7 West 81st Street; office 10 East 40th Street.

Direct examination.

By Mr. Weiss:

Q. Will you please state what is your occupation?

[fol. 157] A. I am in the real estate business and have been in that business for the past 33 years.

Q. What was the nature of this business that you were engaged in, what phases of it?

A. I went into this business in 1919. At that time I was connected with—well, later I became vice-president of Realty Associates, Inc., and I was associated with various subsidiary corporations of Realty Associates which later became New York Investors and among their subsidiaries was the Prudence Company which was a mortgage loan company, Realty Associates Security Corporation, and numerous other subsidiary and allied corporations. I was with that company for approximately ten years, and from 1929 until 1932 I maintained an office at 225 West 34th Street in the real estate business. Also had an office at 189 Montague Street, Brooklyn, from 1932 to 1934. No, it was to 1935. I was associated with the real estate firm of Tankoos, Smith & Company, and I inaugurated and took care of their management and appraisal departments.

From 1935 until the present time I have had my own office. For the past—since I have had my own office—I have specialized in appraisal work more particularly in the Borough of Manhattan. Of course I did much appraisal work prior to that time. But prior to the time that I specialized in appraisal work, I bought and sold many millions of dollars of real estate in New York, also did a great deal of [fol. 158] building, everything from small one family homes to large apartment houses, manufacturing buildings, garages, in fact every type of structure. Did a great deal of

mortgage work and in fact every phase of the real estate business.

Q. What records do you maintain in your office with regard to real estate transactions?

A. I maintain records on cards, approximately 200,000 cards, one card for every piece of real estate in the Borough of Manhattan, and these cards go back to 1928, and on these cards there are pasted the clippings from the weekly publication known as the "Real Estate Record and Guide" which publication has been issued in the City of New York since 1879. That publication records every instrument that is recorded in the Hall of Records of the Borough of Manhattan having to do with real estate, conveyances, mortgages, satisfaction of mortgages, assignments of mortgages, auction sales, foreclosures, recorded leases, and every, as I say, every recorded transaction, so that I have and maintain in my office a running record of all real estate transactions in the Borough of Manhattan dating back to 1928, which enables me to keep very closely in touch with everything that is going on in real estate in the Borough of Manhattan, particularly with sales and the prices these properties are being sold and leased, mortgaged, and the like.

This record then, that I keep, has only one other of its kind in the City of New York, that is maintained by the [fol. 159] Real Estate Board of New York, Inc., and for a good many years I was chairman of the Records Committee of that Board, and I am not chairman of the Committee but I am still on the Records Committee and possibly the most active man in connection with the recording of the real estate bought.

I am a member of the Real Estate Appraisal Committee of the Board of New York. I am a member of the Legislation Committee and several other committees of the Board.

I am a licensed real estate broker.

Q. For what companies have you appraised property?

A. I started to jot down a list here in court before to refresh my memory. I will read from that list that I wrote, started to write. I can give you most of it from memory without referring to it.

I do all the appraisal work for the New York Central Railroad in the Borough of Manhattan and for the New York, New Haven and Hartford Railroad.

I have appraised properties for many banks in the City of New York, some of which are the City Bank Farmers Trust Company, the Empire Trust Company, Sterling National Bank, the Chemical National Bank and Trust Company, Corn Exchange Bank, the Manhattan Savings Bank, Union Dime Savings Bank, Seamen's Bank for Savings, New York Savings Bank; for various insurance companies: Metropolitan Life Insurance Company, New York Life Insurance Company, Reinsurance Underwriting Company, Mutual [fol. 160] Life Insurance Company; for many large operators and real estate owners in the City of New York such as Webb & Knapp, Paterno Estates, formerly known as Charles Paterno, now dead, Cruikshank, Brown, Benenson and others too numerous to mention.

The Court: Oh, I should think that this is sufficient.

By Mr. Weiss:

Q. About how many properties have you appraised and where were those properties located?

A. I never counted them, but I would say they are into many thousands. I would say upwards of four and five thousand properties in the Borough of Manhattan.

Q. What are some of the principal properties you appraised in midtown New York City area?

The Court: Let me say this—well, you can go ahead, but the Court is convinced his is an experienced appraiser.

The Witness: Some of the midtown properties: The Waldorf Astoria Hotel, the Biltmore Hotel, the Roosevelt Hotel, the Barclay Hotel, Park Lane Hotel, the Marguery at 270 Park Avenue, the square block at 277 Park Avenue running over to Lexington Avenue. And in the vicinity of the subject property under review in this proceeding, I have made appraisals of 513 to 519 Seventh Avenue which is immediately opposite the subject property located at the south [fol. 161] easterly corner of Seventh Avenue and 38th Street. This property at 1431 Broadway, 1435 Broadway, 1472 Broadway which is at the corner of 37th Street, 106 to

114 West 38th Street between Sixth Avenue and Broadway. 552 to 554 Seventh Avenue. 558 Seventh Avenue. 568 Seventh Avenue. 570 to 576 Seventh Avenue. 582 to 584 Seventh Avenue.

Mr. Weiss: I guess we are satisfied that you have the necessary——

The Court: Yes. The Court is satisfied that Mr. Mayer is an experienced appraiser.

By Mr. Weiss:

Q. What was the trend of land values in the years 1943, 1944 and up to say June of 1945 in the City of New York?

A. In my opinion the value remained constant, particularly in the neighborhood of the subject property or should I say specifically in the neighborhood of the subject property.

Q. How does the City of New York assess land value?

Mr. Madden: Objection, if the Court please.

The Court: What is the object, Mr. Weiss?

Mr. Weiss: The purpose of the question is to show that we are trying to—that in assessing value of the land or in fixing the value of land that you take the land unimproved, and vacant in determining its value, and I believe that the New York City law and the State of New York in determining assessed value, values for assessment purposes, bases these values on the land as if it were with no improve- [fols. 162-167] ments on it. And we are trying to obtain from the witness what was the value of land and how did they—trying to get what the law is if this witness knows it.

The Court: I cannot see the relevancy of what is the law in the City of New York with regard to assessments. We do not have any issue in this case with respect to assessments.

I sustain the objection.

By Mr. Weiss:

Q. In the light of your experience and expert knowledge, what was the value of the land as if vacant and unimproved in the year 1945 on which the building of the petitioner stood?

A. $660,000.

Q. How do you arrive at that value?

A. From a comparison and study of comparable sales in the immediate area of the subject property. And I have the information of those sales with me compiled and analyzed.

[fol. 168] By Mr. Weiss:

Q. What was the relative value of vacant and unimproved land and the rental for such land in the mid-1920's as compared to the year 1945?

A. I would say that in the mid-1920's, and that fixes it to say the year 1924 at the time this particular lease was originally made, those prices, and I use the word "prices" rather than the word "values", the prices at that time for leases and sales were between two and one-half and three times the values of 1945.

Q. Will you please discuss the question of the determination of land values by rent paid on long term leases?

[fol. 169] A. Will you read the question, please?

(Record read.)

Mr. Madden: I object, if the Court please.

The Court: I sustain the objection. The witness has given his opinion as to the value of the land in question without reference to any building. I think he said $660,000 on the date inquired about.

The Witness: That is right, sir, as if vacant and unimproved.

The Court: That is the way I understood it. Now you may of course interrogate the witness in any way you want to as to how he arrived at that. I think the purpose of the exhibit was to give some information along that line.

Mr. Weiss: I will ask the following questions—

By Mr. Weiss:

Q. Does rent income by itself determine the value of land?

A. No. Rental value is a determinative factor of the value of land, but some rental fixed at some previous period which perhaps was an inflationary period or boom period, some such a rental in and of itself does not fix the value of

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land as if vacant and unimproved. The rental value of that land at the time the appraisal is to be made is certainly a factor to be considered in fixing the value of that land.

Q. In other words, you have determined that the value [fol. 170] of the land was $660,000 in the year of 1945?

A. That is the value, yes, in my opinion.

Q. Now, what would be the rental value of the property worth this figure you mentioned, $660,000?

A. That would be $49,0[illegible] a year net.

Q. Would you say, then, that if this petitioner were paying an amount in excess of $40,000 rental that the excess is a price, say, to be relieved of——

Mr. Weiss: May I withdraw the question and put it this way——

By Mr. Weiss:

Q. You have stated that $40,000 is the fair rental value of the land on which the Millinery Center Building is located?

A. In 1945.

Q. In the year 1945. Do you consider that any price paid above that would be excessive in rent—any rental paid above $40,000 would be excessive?

A. That is axiomatic. Its value is $40,000 in 1945, and anything above that is more than its value in 1945.

Q. It has been stipulated in this case that a property located on the corner of 38th Street and Broadway, called Lot 55, Block 813, was sold to the Woodmen of the World Life Insurance Company for the price of $2,250,000. Now you have stated that the land value of petitioner's property was worth $660,000. How do you reconcile such a valuation [fols. 171-207] with respect to the Millinery Center property as against the price paid by Woodmen of the World for the 38th Street and Broadway property?

A. The deal wherein Woodmen of the World Life Insurance Society and Omaha Woodmen Life Insurance Society purchased that property was what we call in real estate parlance as a custom made or one in deal. Involved in that transaction there was a long-term net lease. I am trying to find the record of the lease. Just a minute. There was a long-term net lease. There was a very involved deal. I had the various recorded instruments noted on my card here in

the clippings. It was a lease extension from Wendel Foundation to Equity Development Corporation for 21 years, from 1945, at $18,000. That lease was assigned by Wendel Foundation to Woodmen of the World Life Insurance Society and Omaha Woodmen Life Insurance Society and without going through all of the various recorded instruments, the Woodmen of the World Life Insurance Society was buying an improved lot, not buying a piece of land. They were buying a lot sold with a building on it.

Q. Would you consider that the price that was paid was the value of the land?

A. It definitely was not. I have the sales of land plat, land sales right in the immediate vicinity of the subject property. They are contained within my booklet.

It is my opinion they reflected the value of land.